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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy

ADDENDUM

Report on the mission of the Special Rapporteur to Colombia

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Introduction*

1. The present report concerns a fact-finding mission to Colombia undertaken from 15 to 27 September 1996 by the Special Rapporteur on the independence of judges and lawyers pursuant to resolution 1994/41 of the Commission on Human Rights, adopted at its fiftieth session, that called upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions thereon.

2. In his first annual report to the Commission on Human Rights in 1995, the Special Rapporteur briefly touched upon the issue of anti-terrorism measures affecting judicial independence or the independence of the legal profession. In this respect, he indicated that the creation of special courts, or the implementation of measures such as the hooding of judges, could raise larger questions of due process which may have some bearing on the notions of judicial independence and impartiality. The Special Rapporteur suggested that some standard-setting might be required in this area (E/CN.4/1995/39, para. 60).

3. In his second report to the Commission, in 1996, the Special Rapporteur elaborated on the issue of the use of "faceless" judges and secret witnesses as a means of protecting the judiciary from acts of terrorism. The Special Rapporteur indicated that he continued to receive information relating to the situations in Colombia and Peru, where the judiciary had been targeted. In his preliminary conclusions, the Special Rapporteur expressed the view that such tribunals violated the independence and impartiality of the justice system for a variety of reasons. In view of the fact that this issue needed further study and analysis, he expressed the hope that he would be able to carry out a mission to Peru and Colombia to investigate these practices in situ, and to do a more exhaustive survey worldwide of similar practices before stating his final conclusions and recommendations (E/CN.4/1996/37, paras. 66-78). The Special Rapporteur informed the Commission on Human Rights about his interventions in 1995 with regard to a number of cases of threats against judges and lawyers. Moreover, the Special Rapporteur had sent urgent appeals concerning a number of lawyers (E/CN.4/1996/37, paras. 135-138 and 205-213).

4. In view of the information mentioned above, the Special Rapporteur expressed his wish to undertake a fact-finding mission to the two countries; he therefore proposed to combine his mission to Peru with one to Colombia. The invitation was extended to him by the Government of Colombia in the course of 1995. The mission to Colombia (15-27 September 1996) followed immediately the mission to Peru (9-15 September 1996). In view of the complexity of the issues examined during the two visits, it was decided to report to the Commission on Human Rights in two separate reports. The report on the visit to Peru is contained in E/CN.4/1998/39/Add.1.

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* Editor's note: In the present document the English translation of Spanish legal terms has been harmonized with the terminology used in documents E/CN.4/1998/16 and E/CN.4/1998/135 concerning Colombia.

5. The focus of the mission to Colombia was to study the so-called "regional courts", a system created by the Colombian Government in order to prosecute civilians charged with terrorist-related crimes and drug trafficking in light of the accepted international standards concerning the independence and impartiality of the judiciary, and the right to due process.

6. Consequently, the Special Rapporteur paid particular attention to the jurisdiction of the "regional courts" established under emergency legislation to try mainly terrorist-related crimes and serious drug-related offences when the identity of the judges, prosecutors and witnesses are not revealed to the accused. Further, the Special Rapporteur looked into the anti-terrorist legislation and its implication on the independence and impartiality of the judiciary, tribunals and individual judges and lawyers.

7. In addition, the Special Rapporteur was informed about the widespread situation of impunity, in particular in military tribunals, in cases concerning human rights violations committed by members of the armed forces, and the collective atmosphere of fear in which members of the judiciary, prosecutors and lawyers live. In this regard, the Special Rapporteur would like to address the problem of impunity and of intimidation of the judiciary. He was informed of the attempts to amend the 1991 Constitution providing a stronger legal basis for the expansion of military jurisdiction over human rights violations; he addresses this issue as well. The jurisdiction and functions of the ombudsman or People's Advocate (Defensor del Pueblo), insofar as they relate to judicial independence, were also of interest to the Special Rapporteur as well as the recent rulings of the Constitutional Court on issues related to the independence of the judiciary.

8. The Special Rapporteur also wishes to address ongoing issues of concern which are closely related to the primary focus of his fact-finding mission.

9. As Colombia has ratified many international human rights treaties, it is relevant to note a provision of the 1991 Constitution which concerns international treaties: article 93, for example, provides that "international treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically"; in addition, it provides that "the rights and duties mentioned in this Chapter will be interpreted in accordance with international treaties on human rights ratified by Colombia".

10. Colombia has ratified, inter alia, the following international human rights instruments: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, American Convention on Human Rights.

11. In addition, given the situation of internal armed conflict that the State is faced with and the fact that the Government has ratified the relevant international humanitarian treaties, the Special Rapporteur also took into consideration international humanitarian standards concerning the right to due process and the right to have an independent and impartial court during a

non-international conflict. He therefore took into account article 3 common to the four Geneva Conventions of 1949 and article 6 of Protocol II Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts.

12. The Special Rapporteur also took into consideration the following international instruments: Standard Minimum Rules For the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, United Nations draft universal declaration on the independence of justice (the Singhvi Principles) 1/, the International Bar Association (IBA) Minimum Standards of Judicial Independence, 2/ Paris Minimum Standards of Human Rights Norms in a State of Emergency, 3/ United Nations Basic Principles on the Independence of the Judiciary, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, United Nations Basic Principles on the Role of Lawyers, United Nations Guidelines on the Role of Prosecutors, Johannesburg Principles on National Security, Freedom of Expression and Access to Information. 4/

13. Prior to undertaking his visit to Colombia, the Special Rapporteur submitted to the Colombian Government the terms of reference for fact-finding missions by special rapporteurs/representatives of the Commission on Human Rights. Throughout the mission, the Special Rapporteur and the United Nations staff who accompanied him were given freedom of movement in the whole country and freedom of inquiry; this, together with the appropriate security measures taken by the authorities, ensured the successful accomplishment of the mission. In view of the security situation at that time, the Special Rapporteur was discouraged by the Resident Representative of the United Nations Development Programme (UNDP) to pursue his intended visit to Cúcuta; the delegation, therefore, returned to Bogotá on 25 September. But this enabled the Special Rapporteur to carry out various follow-up meetings with officials he had previously met in Bogotá.

14. The Special Rapporteur visited Colombia from 15 to 27 September 1996. From 15 to 22 September he held consultations in Bogotá with the following government officials: Minister of Foreign Affairs, María Emma Mejía Velez; Vice-Minister of Foreign Affairs, Camilo Reyes Rodríguez; Minister of Justice and Law, Carlos Eduardo Medellin Becerra; Vice-Minister of Justice and Law, Carlos Alberto Malagon Bolaños; Director-General of International Affairs, Ministry of Justice and Law, Sandra Alzate; Ministerial Advisor, Jorge Ivan Cuervo; Procurator-General of the Nation (Fiscal General de la Nación), Alfonso Valdivieso Sarmiento; Vice-Procurator-General (Vice-Fiscal General de la Nación), Adolfo Salamanca; Human Rights Coordinator, Procurator-General's Office, Maria Claudia Pulido; prosecutor, Juan Carlos Gutierrez; Chief, Office of Internal Oversight Services (Oficina Veeduría), Procurator-General's Office, Claudia Patricia Arguello Salomon; Coordinator, Unidad Patrimonio, Hernando Ardila; Coordinator, Unidad de Vida, Patricia Salazar Baron; President, Supreme Court, Jose Roberto Herrera Vergara; Vice-President, Supreme Court, Juan Manuel Torres Fresneda; President, Civil and Agrarian Chamber of Cassation (Sala de Casación Laboral), Jorge Antonio Castillo Rugeles; President, Labour Chambers of Cassation, German Valdes Sanchez; President, Chamber of Penal Cassation (Sala de Casación Penal),

Fernando Arboleda; President, Constitutional Court, Carlos Gaviria Diaz; President, Higher Council of the Judicature (Consejo Superior de la Judicatura), Carlos Villalba Bustillo; President, Disciplinary Chamber, Superior Council of the Judiciary; Miriam Donato; People's Advocate (Defensor del Pueblo), Jose Fernando Castro; Presidential Adviser on Human Rights (Consejero Presidencial para los Derechos Humanos), Carlos Vicente de Roux; Coordinator, Political Issues (Coordinador de Areas Politicas, Consejería Presidencial para los Derechos Humanos), Carlos Vicente de Roux. The Special Rapporteur regrets that an interview with the Minister of Defence, to which the system of military justice belongs, could not be arranged.

15. In addition, the Special Rapporteur met with members of lawyers associations, individual judges, prosecutors and lawyers, as well as with experts in the administration of justice, legal and penitentiary affairs. He also met with representatives of the following non-governmental organizations in Bogotá and Medellín: Colombian Commission of Jurists; Comité Solidaridad con los Presos Politicos (CSPP); Corporation "MINGA"; Corporation SEMBRAR; Comisión Intercongresional "Justicia y Paz"; Comité Permanente para la Defensa de los Derechos Humanos; Instituto Latinoamericano de Sevicios Legales Alternativas (ILSA); Centro de Investigación y Educación Popular (CINEP); Asociación de Familiares de Detenidos-Desaparecidos de Colombia (ASFADDES); FEDEFAM; National Mutual Aid Association - (Asociación Nacional de Ayuda Solidaria - ANDAS); Members of the Escuela Nacional Sindical.

16. In addition, the Special Rapporteur held consultations with a representative of ASONAL Judicial, a trade-union for judges ("gremio de jueces"), Lawyers Collective "Alvear Restrepo" (Colectivo de Abogados), members of the Bar Association of Bogotá (Colegio de Abogados de Bogotá) as well as with individual judges, prosecutors and lawyers.

17. In Bogotá, the Special Rapporteur also held consultations with the Permanent Representative of the United Nations Development Programme (UNDP).

18. From 22 to 25 September 1996, the Special Rapporteur visited Medellín where he met with Mr. Leon Dario Restrepo, President, Superior Tribunal of Medellín; Alvaro Gonzalez, Defensor Regional de Antioquía; Rafael Rincon, municipal representative (personero municipal) of Medellín; Alvaro Uribe Velez, Governor of Antioquía; Fernando Mancilla Silva, Director, Regional Procurator's Office in Antioquía (Director, Fiscalía Regional de Antioquía); Augusto Vasquez Díaz, Mayor of Medellín.

19. The Special Rapporteur wishes to thank the Government of Colombia, and in particular the Ministry of Foreign Affairs, for the invitation to visit Colombia, as well as for the arrangements for the meetings and visits held during the mission.

I. GENERAL BACKGROUND

20. Colombia has suffered from a long history of violence and violence still continues. At the time of the mission, figures from the Office of the Procurator-General of the Nation (Fiscalía General de la Nación) indicate that approximately 100 violent deaths occurred daily. While common crime and social violence are the causes of most violent deaths in the country, the rate

of politically motivated homicides and executions is one of the highest in the world; of the almost 30,000 violent deaths a year, roughly 3,500 are considered to be politically motivated.

21. In 1996 and 1997, the human rights situation deteriorated seriously: it was reported that between October 1996 and March 1997, 1,704 people were victims of social and political violence. The majority of victims are found among the civilian population, particularly within peasant communities. The increase in human rights violations reportedly committed by paramilitary groups is commensurate with the extension of the territories they control and the development of their activities. Consequently, an atmosphere of general fear prevails and there has been a massive exodus of population.

22. Despite Government promises of disbanding paramilitary groups, these are in fact becoming more powerful and are responsible for the majority of extralegal executions, acts of torture and forced disappearances. Serious allegations were brought to the attention of the Special Rapporteur concerning the links between the paramilitary groups and the armed forces. At the same time, the Government maintained its support to the cooperatives or associations of rural security called "Convivir", created and regulated by Special Decree No. 356 of 1994 which promotes an involvement of the civil population in the conflict. In this regard, the Special Rapporteur noted the concluding observations of the Human Rights Committee adopted on 9 April 1997 following the consideration of the fourth periodic report (CCPR/C/103/Add.3 and HRI/CORE/1/Add.56) of Colombia in which the Committee expressed deep concern "at the evidence that paramilitary groups receive support from members of the military"; the Committee added that "the recently adopted decree which would have the effect of legalizing the constitution of armed civilian groups (the so-called Rural Security Cooperatives) would seem to aggravate this situation" (CCPR/C/79/Add.76, para. 17).

23. At the time of the mission, the country continued to be besieged by a severe political crisis, a situation confirmed by several public authorities and non-governmental sources. Over the past two years, guerrilla groups continually clashed in violent confrontations with members of the armed forces as well as with paramilitary groups. Numerous human rights violations and breaches of international humanitarian law are alleged to have been committed by State agents ranging from enforced disappearances, torture and thousands of deaths, as a result of extrajudicial or arbitrary killings (see also CCPR/C/79/Add.76, para. 15).

24. The deteriorating situation in Colombia has drawn the attention of the international community. As a result, the Commission on Human Rights has been studying the human rights situation publicly and several country visits were made in order to study the situation in situ. On 13 December 1994, the then High Commissioner for Human Rights, Mr. Ayala-Lasso, met with the President of Colombia in Bogotá and suggested that the President might wish to consider the appointment of an expert with a mandate to study the situation in Colombia. In view of the Government's positive reaction, the High Commissioner sent an evaluation mission to Colombia that recommended inter alia the establishment of an office of the High Commissioner for Human Rights. In 1996, during the fifty-second session of the Commission on Human Rights, the Chairman of the Commission proposed the establishment of an office of the High Commissioner in

Colombia. Subsequently, the President of Colombia sent an invitation to the High Commissioner for Human Rights to open an office in Bogotá. An agreement was reached and subsequently signed in Geneva on 29 November 1996 between the Government of Colombia and the High Commissioner for Human Rights. The general aims of the Office are inter alia to "observe the situation of human rights with a view to advising the Colombian authorities on the formulation and implementation of policies, programmes and measures to promote and protect human rights in the climate of violence and internal armed conflict prevailing in Colombia" (E/CN.4/1997/11, Annex). The work of the Office began on 6 April 1997.

25. For an in-depth analysis of the present situation in Colombia, the Special Rapporteur refers to the report of the United Nations High Commissioner for Human Rights on the setting up of the Office in Bogotá and its activities, and on developments in the human rights situation (E/CN.4/1998/16).

A. The crisis in the administration of justice

26. The crisis in the administration of justice in Colombia has been acknowledged by the representatives of the Commission on Human Rights who visited the country, as well as by national institutions, for instance, the Higher Council of the Judicature (Consejo Superior de la Judicatura) and the Attorney-General of the Nation (Procurador General de la Nación) and by non-governmental organizations. The various studies dealing with the matter agree that the main problem affecting the judiciary in Colombia is the high rate of impunity at both ordinary criminal courts and military criminal courts. As stated in the 1995 joint report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, "impunity is both the cause and the consequence of violence and, in particular, of human rights violations. Fear of further violence prevents victims and witnesses from taking legal action, while the absence of effective investigations and penalties leads government officials and other persons to believe that their actions will go unpunished. Moreover, the lack of penalties, particularly for heinous crimes, simply creates a desire for revenge and to take the law into one's hands." (E/CN.4/1995/111, para. 77)

27. Most of the persons interviewed, including public authorities, shared the opinion that although Colombia is a legalistic country, with a well-structured judicial system, there is an obvious absence of the rule of law. With an impunity rate of 97 per cent, as confirmed by the Procurator-General there is virtually no confidence in the functioning of the system of justice. Increasing corruption within the public and administrative institutions, including the judiciary, is a serious cause for concern, and constitutes an increasing threat to an independent and impartial judiciary. In addition, increasing pressure on the judiciary is coming from the armed forces, security forces and the police, which on the one hand criticize the administration of justice for its ineffectiveness and, on the other hand, obstruct its work with regard to the investigation of the police and the armed forces. Furthermore, the implicit acceptance of paramilitary activities by the armed forces has been a major obstacle in the administration of justice. The Procurator-General informed the Special Rapporteur that the rule of law

was dead in Colombia; his words were echoed by the President of the Constitutional Court.

28. The decline of public confidence in the current judicial system also stems from the difficult access to judicial remedies and from the delays with which cases are tried. On the whole, the inefficient response of the judicial system to the requests by citizens has led to a confidence crisis in the administration of justice. Despite the extensive institutional structure dealing with investigations of human rights violations, the activities of the competent institutions lack any effect in practice. There is also an apparent lack of coordination between various judicial bodies, investigatory institutions, the armed forces, security forces and the judiciary, resulting in duplication of efforts.

29. The Special Rapporteur was informed of problems concerning access to justice faced particularly by populations who are mainly displaced as a result of the armed conflict. According to different sources, between 600,000 and 1,000,000 persons were displaced in Colombia. Many writs for the protection of constitutional rights (acción de tutela) had been submitted by representatives of a group of internally displaced persons in Medellín, in order to get a judicial decision about fundamental rights which were violated due to their displacement and poor living conditions. It appeared that these writs which are specifically meant to guarantee fundamental rights were routinely dismissed by the competent judges. In other cases, the delays frustrated the effectiveness of the writs.

30. In the report on his visit to Colombia in June 1994, Mr. Francis Deng, Representative of the Secretary-General, said that, internally displaced persons are particularly vulnerable to human rights abuses: "displacement also causes the curtailment of access to judicial and other authorities and political participation, since it usually requires interaction with the public authorities in the reception area" (E/CN.4/1995/50/Add.1, para. 70).

31. Another factor that has contributed to the crisis of the judiciary is that for more than three decades the country has been governed through exceptional measures that allegedly have weakened the judiciary and violated fundamental rights of individuals. According to article 213 of the 1991 Constitution, a state of internal disturbance may be declared by the President with the approval of the Ministers for a period of 90 days, extendible for 2 similar periods, the second of which requires the consent of the Senate. This state of internal disturbance is pronounced during times of "a serious disruption of public order imminently threatening institutional stability, the security of the State, or the peaceful coexistence of the citizenry, and which cannot be met by the use of the ordinary powers of the police authorities".

32. Article 213 further provides that during times of internal disturbance all laws incompatible with Presidential decrees are suspended, yet the President's power to legislate these emergency decrees is checked by the Constitutional Court's judicial review as provided by article 214,6. 5/ Notwithstanding these constitutional limitations on the declaration of a state of internal disturbance, abuses of power continue to occur.

33. As a result of the declaration of the various states of internal disturbance, it is alleged that fundamental rights and freedoms have been severely limited, and increasing powers of prolonged arrest and detention without judicial warrant from a judge have been given to members of the security and armed forces. In this regard, the Special Rapporteur welcomes recent information concerning the discontinuation of the state of internal disturbance during the year of 1997.

34. During his mission, the Special Rapporteur was informed by members of the judiciary and of the legal profession of the lack of appropriate training relating to international standards and international law. This has serious implications on adjudication of cases involving military officials and transferring them to military courts despite the fact that the military officials were charged with crimes such as torture that are regarded as "crimes against humanity".

B. General structure of the judiciary

35. The 1991 Constitution reorganizes and reinforces the organization of public power into the three traditional branches of the democratic system, the executive, legislative and judicial branches. The judicial branch is composed of the office of the Procurator-General (Fiscalía General de la Nación) and the Higher Council of the Judicature (Consejo Superior de la Judicatura). The court system is comprised of two main jurisdictions, the ordinary and the military.

36. The Supreme Court of Justice (Corte Suprema de Justicia) is the highest judicial organ in the ordinary jurisdiction, followed by the appellate courts and the first instance single-judge courts which have jurisdiction over civil, criminal, family, agrarian and labour matters. The regional courts, previously called public order courts, and known as "faceless" courts due to the anonymity of judges, prosecutors and witnesses form part of the ordinary criminal jurisdiction. The military courts function separately; this jurisdiction is organized into lower courts, one appellate court called the Military Appeals Court (Tribunal Superior Militar), and the Supreme Court of Justice as a court of cassation.

37. The judges of the Constitutional Court, the Supreme Court of Justice and the Council of State, are elected for a single term of eight years. Article 233 of the 1991 Constitution provides that "they cannot be re-elected and will remain in office while they display good behaviour, perform satisfactorily and have not reached the age of mandatory retirement". Judges of the Constitutional Court are elected by the Senate from lists of candidates presented by the President, the Supreme Court and the Council of State. The Constitutional Court decides inter alia on the constitutionality of petitions, legislative decrees of the Executive and proposed statutory bills, in addition to interpreting decisions of writs for protection of consitutional rights (acción de tutela). 6/ The 23 judges of the Supreme Court of Justice and the 26 magistrates of the Council of State are elected by their respective members from lists of candidates submitted by the Higher Council of the Judicature (Consejo Superior de la Judicatura).

38. In penal matters, the hierarchy of the courts is composed in the following manner: the Supreme Court of Justice; the Superior Judicial District Court; the Circuit Court (Juzgado de Circuito); the Municipal Courts (Juzgado Municipal) and the courts of first instance (Juzgado Promiscuo). Crimes deemed to present a threat to national security such as narcotics trafficking, terrorism, subversion, and abduction are tried in the regional courts system.

39. The Office of the Procurator-General of the Nation (Fiscalía General de la Nacion) directs and coordinates all criminal investigation conducted by the national police and other departments provided for by law, save those covered by the military jurisdiction. It is important to note that in the investigatory phase, the Office also acts as the judicial authority and can issue arrest warrants and writs of detention, order searches, and impound property. When the case reaches the trial stage, a judge is assigned and the Procurator-General's Office assumes the exclusive role of prosecution.

40. The Office of the Procurator-General has the competence to initiate criminal investigations and bring charges against suspects before the courts; exempted from these investigations, however, are the crimes committed by active duty members of the public forces in relation to the service. The Attorney-General is elected for a single four-year term, by the Supreme Court of Justice, from a list of three candidates submitted by the President of the Republic according to articles 249 and 173.7 of the 1991 Constitution. Being defined as a part of the judicial branch in the 1991 Constitution, prosecutors (fiscales delegados) of the Office of the Procurator-General are conferred certain judicial powers, such as the right to issue detention orders.

41. Through the establishment of the Office of the Procurator-General the administration of justice in Colombia to some extent shifted from an inquisitorial to an accusatorial system. Moreover, inadequate training provided to the new prosecutors severely hindered their efficiency in fulfilling the new functions. This lack of training is compounded by the backlog of cases which further delays the system. At the onset in 1991, the Office of the Procurator-General inherited approximately 1.5 million cases.

42. As part of its investigatory functions, the Procurator-General directs the activities of approximately 3,200 prosecutors and the 4,000 member judicial police force. The judicial police, in charge of conducting all the initial investigations of cases, is composed of officials of the national police along with economists, administrators and medical or paramedical experts. A Technical Group for Investigation (CTI), composed of members of the judicial police, also exists under the Procurator-General to assist prosecutors in their investigations. While the Office is financially and administratively an autonomous organ, these investigators generally receive a lower remuneration than other legal professionals.

43. The Special Rapporteur was informed that in September 1996 approximately 1,600,000 cases were in the investigatory stage, 30,000 of which were before the "regional justice". Once the Procurator-General assigns a case to the Director of his Office, the prosecutors decide for themselves whether the case goes before a regional prosecutor or a ordinary prosecutor. The Special Rapporteur was informed that there was no reliable source available then to

indicate the status of the cases being processed. That network system was being developed in order to provide detailed information; it was therefore impossible to measure the progress made since the establishment of the Office in 1991.

44. The Procurator-General asserted that his Office was financially secure in terms of resources, but there was a definite need to raise the standards of the work being done; in spite of the high level of impunity at the national level, the general public was pleased with the progress made by his Office. The Vice-Procurator-General (Vice-Fiscal de la Nación), on the other hand, stated that, due to budget cut-backs, the Office did not have the necessary infrastructure to properly process all outstanding cases. Technical training programmes for prosecutors were a major priority for the Office; such programmes were being developed alongside refresher courses on specific issues, such as human rights, which were provided on a regular basis.

45. As regards the continued violence caused by terrorist groups, the Procurator-General stated that judicial action was lacking; while the judiciary condemned the actions of state security forces, it failed to prosecute those responsible. The Procurator-General confirmed that the activities of his Office were also rather limited in this particular field.

46. Within the office of the Procurator-General there is a Human Rights Unit (Unidad para los Derechos Humanos) which had been active for a year at the time of the mission. Members of that Unit were faced with difficulties in identifying the increasing number of paramilitary groups whose activities threatened the country. Nor could they provide precise information on the so-called "self-defence groups" which were being established by civilians throughout the country as a result of the increase in violence and the failure of the State security system to provide protection.

47. The prosecutors of the Human Rights Unit encountered obstacles in investigating cases in certain regions of the country. Uraba, for example, one of the most violent regions in Colombia, where both guerrilla and paramilitary groups carry out frequent attacks against the civilian populations, had been virtually closed to the Human Rights Unit for a long period of time. It was the task of the Human Rights Unit to remedy the previous situation where many areas were deprived of any judicial presence, as a result of which impunity reigned and the people felt ignored by the system.

48. At the time of the mission, the Unit had 96 cases under active investigation: 22 related to subversive actions and violations of humanitarian law; 39 actions against State officials for human rights violations; 29 cases of paramilitary activities; 6 cases especially concerning drug-trafficking, without a direct link with human rights violations.

49. The Unit had reportedly lacked resources and funds to conduct its functions adequately. For example, there was only 1 Xerox-machine to serve the needs of officials that investigated the 96 cases mentioned above. The general consensus was that the Government lacked the political will to combat human rights abuses and address the problem of violence.

50. The Colombian legal system also provides military criminal courts and administrative courts. The military criminal courts are composed of a Military Appeal Court and the lower military courts, which investigate and try offences committed by members of the police and the armed forces on active duty and in relation to their public service, in accordance with the requirements of the current Military Penal Code and Article 221 of the Constitution. The administrative courts decide on cases of compensation for loss or injury suffered by individuals as a result of acts of government officials; the Council of State (Consejo de Estado) is the supreme body of the contentious administrative jurisdiction. The Special Rapporteur regrets that he could not meet with members of the Council of State.

51. Independent from the judicial, legislative and executive branches, the Government Procurator's Office (Ministerio Público) is a governmental monitoring body that also has jurisdiction for the protection of human rights; it is composed of the Office of the Attorney-General of the Nation (Procuradoría General de la Nación), the Office of the People's Advocate (Defensoría del Pueblo) headed by an "ombudsman", and municipal representatives (personeros municipales).

52. The Attorney-General of the Nation (Procurador General de la Nación) is the highest authority in matters relating to the official conduct of persons in public service; he exercises disciplinary authority, conducts the appropriate investigations and imposes the appropriate penalties according to article 277 of the Constitution. He also exercises external disciplinary authority over government institutions, independently of the internal disciplinary authority of each institution. He may refer any evidence it collects to the prosecutors and judges for the purpose of relevant criminal proceedings.

53. The duties of the People's Advocate (Defensor del Pueblo) are governed by Article 282 of the Constitution: they include, inter alia, advising and instructing inhabitants of the national territory and Colombians abroad in the exercise and defence of their rights before the competent authorities or private entities; publicizing human rights and recommending policies for promotion; asserting the right to the remedy of habeas corpus, as well as other constitutional guarantees.

54. The municipal representatives (Personeros Municipales), perform the functions of the Government Procurator (Ministerio Público) in matters within the jurisdiction of the municipal criminal courts and courts of mixed jurisdiction and of the prosecutors assigned to the circuit, municipal and mixed courts (article 131 of the Code of Penal Procedure). Like the People's Advocate (Défensor del Pueblo), they help ensure an appropriate response to human rights violations by judicial and State authorities, but they have no jurisdiction to impose penalties.

55. The Higher Council of the Judicature (Consejo Superior de la Judicatura) is one of the new bodies created by the 1991 Constitution and it is an autonomous entity within the judicial branch. It is divided into two chambers: the Administrative Chamber and the Disciplinary Jurisdictional Chamber.

56. The Administrative Chamber, made up of six judges elected for an eight-year period, has wide-ranging competencies with regard to the administration of the judicial branch, including budget allocation and implementation. In addition to these functions, it oversees the Office of the "Judicial Career" which evaluates candidates for appointment by the various high courts. The Chamber does not, however, draw up candidates for the penal military justice system. The Office of the "Judicial Career" provides a form of guarantee of the independence of judges of ordinary jurisdiction, thereby assuring the proper administration of justice. Two members of the Administrative Chamber are elected by the Supreme Court of Justice, one by the Constitutional Court and three by the Council of State. The Chamber's task is to provide training and specialization courses intended for judges, since law faculties primarily train trial lawyers. The Administrative Chamber has established lists of candidates for all types of functions within the judicial branch.

57. The Administrative Chamber has legislative initiative and a function of planning through the faculty to elaborate the Development Plan for the Judicial Branch. Furthermore, it controls and supervises the efficiency of the judicial institutions (article 256 of the 1991 Constitution).

58. The Disciplinary Chamber is made up of seven members elected for an eight-year term by the National Congress from lists submitted by the Government; their independence and impartiality has therefore been questioned by many of the interlocutors.

59. Article 112 of Law 270 of 1996, known as the Statutory Law on the Administration of Justice (Ley Estatutaria de la Administración de Justicia) provides that the Disciplinary Jurisdictional Chamber shall decide over matters related to conflicts of different jurisdictions. As a result, when a conflict of jurisdiction arises between the regular court system and the military court system, the Disciplinary Chamber is the competent organ to decide which forum is competent.

60. The President of the Disciplinary Chamber informed the Special Rapporteur that one of the main problems in the judiciary is that judges have become bureaucrats as a result of the existing procedures which are slow, excessively long and result in lengthy sentences full of quotes. There was an urgent need for speeding up justice. Thus, there is a need for training in ethics for judges and prosecutors. 7/

61. Moreover, the Disciplinary Chamber exercises disciplinary control over lawyers and judges as well as prosecutors of the Procurator-General's office; these disciplinary actions are monitored by the Congress. The Chamber dealt with about 160 cases a month of disciplinary matters.

II. REGIONAL COURTS

62. Decree 1631 of 1987 created the Public Order Courts, renamed Regional Jurisdiction (Jurisdicción Regional) pursuant to a declared state of internal disturbance that has been in effect since 1984; the state of internal disturbance was lifted in 1997. The Public Order Courts were designed to prosecute individuals operating at the highest levels of criminal

organizations threatening the security of judicial personnel and thereby influencing judicial decisions. For this reason, it is provided that the identity of judges hearing these cases, of prosecutors investigating these cases, and of witnesses providing valuable testimony should remain secret.

63. Before the enactment of the new 1991 Constitution, a temporary legislative body converted Decree 1631 of 1987 into permanent legislation. The procedure and the law in respect of the Regional Courts are governed primarily by the Code of Penal Procedure and the Penal Code.

64. The faceless justice system, referred to in Colombia as "regional justice system", is composed of the Supreme Court of Justice, the National Public Order Court (Tribunal Nacional de Orden Público) and Regional Courts (Juzgados Regionales) distributed throughout six regions: Bogotá, Medellín, Cali, Barranquilla, Cúcuta and Villavicencio (department of Meta).

65. Article 71 of the Code of Penal Procedure provides for the following crimes that fall within the regional jurisdiction: (i) rebellion, defined as the use of arms to overthrow the national Government, undermining or modifying the State's constitutional regime or laws as is provided by article 125 of the Penal Code; (ii) conspiracy to commit crime as provided in article 186 of the Penal Code; (iii) terrorism, defined as provocation or maintenance of a state of terror over a population or sector through acts placing the life, health or liberty of persons or infrastructure or media of communications or transport in jeopardy as provided in article 187 of the Penal Code.

66. Even though the Constitutional Court ruled that the military could not act as a police force, but might accompany and protect the police during its investigations, in Decision C-034 of 1993, the Congress enacted Law 104 in 1993 concerning the "accompaniment" measure. It is alleged that the military continues to conduct regular searches and seizures; it arrests and seizes; it arrests, detains and interrogates suspects and witnesses, often without legal counsel present. In addition, Decree 717 of 1996 created special public order zones (zonas especiales de orden público) within which the military have complete control over all public security forces.

67. Article 28 of the 1991 Constitution requires a prior written warrant issued by a competent judicial officer for every arrest. Article 370 of the Code of Penal Procedure provides that the only exception is the case of in flagrante delicto where the suspect is seen committing a crime; this provision has been broadly interpreted by the military to allow it to arrest and to waive the warrant requirement. According to the information received, between 1993 and 1996, the Armed Forces arrested 6,019 persons on suspicion of membership in guerrilla organizations; in 5,500 or over 90 per cent of the cases, the Office of the Procurator-General found there was insufficient evidence to issue formal charges.

68. It is alleged that officials have sought to justify the practice of detaining individuals temporarily within military installations while awaiting transfer to a civilian facility by citing lack of resources and personnel. According to the information received, individuals held in military custody on suspicion of links to the guerrillas have testified that they have been intimidated and tortured to give evidence.

69. In addition, the Office of the Procurator-General (Fiscatia General de la Nación) has an unfettered authority to order arrest, detention and seizures of property under article 250 of the Constitution. Motions can be filed questioning the legitimacy of an arrest or search, but, these motions should be filed before the prosecutor who issued the order, while appeals from his or her decision simply go up the hierarchical chain of command within the Office of the Procurator-General. There is, de jure, an ultimate power of judicial review by the Supreme Court. However, non-governmental organizations claim that in practice there is no review by an independent judge.

70. In the Regional Court system, witnesses for the prosecution are anonymous; this decision rests entirely on the discretion of the prosecutor; the reason provided by the Government is the inability to guarantee the safety of witnesses. Cross examination of anonymous witnesses was authorized only in 1993; however, once it was permitted, it was restricted by the practical difficulties of maintaining the anonymity of the State's witnesses. It was alleged that usually there is no cross examination because there is an assumption that the prosecutor will not produce an unreliable witness. Even though regional court rules do state that the testimony of an anonymous witness cannot by itself sustain a conviction, it can provide sufficient basis for arresting and detaining a suspect. Additionally, it is alleged that when the case enters the judgment phase, prosecutors reveal the name of the witness in an attempt to enhance the probative value of testimony and to ensure convictions. It was also alleged that individuals are often coerced to cooperate with the military in criminal investigations.

71. Judges and prosecutors are also anonymous. Given the obvious problems this situation created in regard to the right to due process of those tried under exceptional circumstances, the Congress tried to introduce some changes in 1996 by adopting the Statutory Law on the Administration of Justice. Article 205 of this law sought to impose some restrictions on the use of anonymous witnesses by providing that the anonymity should be restricted to certain crimes only. However, the Constitutional Court deemed article 205 unconstitutional: these restrictions should not be placed in a statutory law given the fact that they were essentially of a procedural nature; consequently, the use of anonymous witnesses, prosecutors and judges within the Regional Court system is a standard practice. There is, however, an internal regulation in the Office of the Procurator-General which limits use of anonymity at the prosecutor's discretion.

72. It is alleged that the system of the regional courts is used in order to persecute social and political activists, as well as human rights defenders, many of whom are lawyers.

73. At the time of the mission, there was a total of approximately 1,600,000 cases in the various stages of proceedings, of which 30,000 came under the jurisdiction of the regional courts. The Special Rapporteur was informed that there was no reliable source to indicate the status of these proceedings, thus it was not possible to assess the impact of these special procedures since the establishment of the regional courts.

74. The Special Rapporteur was informed of a particular case which illustrates the flaws in the regional court procedures. On 5 December 1996, 12 members of the Unión Sindical Obrera (USO), the trade union for petroleum workers, were arrested by agents of the Office of the Procurator-General of the Nations (Fiscalía General de la Nación) and accused of committing terrorist acts. It is important to note that the petroleum industry in Colombia, nationalized long ago, is controlled today by ECOPETROL, a State-owned company. Among the arrested was César Carrillo Amaya, former president of the USO, the largest member of the most important federation of labour unions, la Central Unitaria de Trabajadores (CUT). The arrests came one month before the USO was due to present its list of petitions to the Government within the framework of an ongoing negotiation of a collective bargaining agreement, giving rise to claims of governmental persecution of the labour movement. The USO trade unionists were charged within the regional justice system of participating in the blowing-up of pipelines carried out by the Ejército Nacional de Liberación (ELN) guerrillas. Their capture and detention were based on the testimony of at least four "faceless" or anonymous informants who collaborated with Army investigations. The Attorney-General (Procurador General), while carrying out his oversight function in this case, determined that some of these anonymous witnesses had been "cloned". In the regional justice system, "cloning" occurs when the same person is presented on two or more separate occasions as different witnesses; this abuse of regional justice has been confirmed in several cases where regular Army informants - some of whom are paid monthly wages to testify - are used to accuse persons of rebellion or terrorist acts. A subsequent judicial decision by the Office of the Procurator-General in response to an appeal lodged by the trade unionists confirmed that witness "cloning" had occurred with respect to some of the testimony, but refused to overturn the arrest orders. At the time of writing, the trial of the 12 labour unionists, and at least 40 more of their colleagues, was pending.

III. REGIONAL COURTS IN LIGHT OF INTERNATIONAL STANDARDS CONCERNING THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND THE RIGHT TO DUE PROCESS OF THOSE TRIED BY THESE COURTS

75. The Government intends to discontinue the regional system by 30 June 1999. Consequently, regional courts will continue to try civilians who are suspects of any of the crimes that fall within their jurisdiction until 30 June 1999.

76. The Special Rapporteur acknowledges the severe situation of violence that the Colombian State was facing and the right of the State to adopt exceptional measures to curb this phenomenon of violence. In fact, several studies have stated that the level of violence of the internal conflict of Colombia reached the threshold provided by standards laid down in international humanitarian law instruments for a situation of an internal armed conflict.

77. In this regard, the right of the Colombian State to derogate from certain rights during a state of emergency is subject to various conditions: the notification; the rule of proportionality; the absence of inconsistency with other obligations under international law; derogation measures must be

non-discriminatory; and, finally, certain rights are non-derogable even during emergency.

78. The shortcomings of the regional court system has been addressed extensively by international as well as internal organizations. These studies conclude that the Colombian State has not observed the rule of proportionality by vaguely defining the crimes that fall within the regional jurisdiction; it has not observed the rule of consistency between these measures and other international obligations by issuing legislation and carrying out practices openly in violation of other international obligations of the State; and, finally, it had suspended fundamental rights that are non-derogable even during a state of emergency, principally the right to due process and the right to have an independent and impartial judge hear those cases.

79. Crimes falling within the jurisdiction of regional courts are defined in an ambiguous way that lead to abusive application. For instance, it was alleged that an individual causing a disturbance by blocking road traffic and causing congestion was charged with terrorism.

80. The involvement of the military in carrying out searches, seizures and detentions of suspects of some of the crimes that fall within the regional jurisdiction raised some concerns in regard to the fairness and impartiality in which investigations were carried out by members of the Armed Forces, who were parties to the internal conflict. In addition the United Nations Human Rights Committee has stated that "searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment" (General Comment 16 adopted at the thirty-second session, 1988, paragraph 8).

81. The powers granted to the regional prosecutors to issue arrest warrants conflict with guideline 10 of the United Nations Guidelines on the Role of Prosecutors that provides "the office of prosecutors shall be strictly separated from judicial functions".

82. The Colombian Constitution requires in article 28 a prior written order issued by a competent judicial officer for every arrest, the only exception being the case of in flagrante delicto as is provided in article 370 of the Code of Penal Procedure.

83. Even though guideline 11 of the United Nations Guidelines on the Role of Prosecutors provides that prosecutors shall play an active role in criminal proceedings, including institution of prosecution, it also provides that where it is authorized by law or consistent with local practice, the prosecutors shall also participate in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest. In fact, prosecutors have a supervisory role in regard to court decisions, instead of an implementative role.

84. Guideline 12 provides that prosecutors shall perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Guideline 13 provides that

in the performance of their duties, prosecutors shall carry out their functions impartially, protect the public interest, keep matters confidential and consider the views and concerns of victims.

85. The main characteristic of the regional justice system is the anonymity of judges, prosecutors and witnesses. The reason given by the Government was to protect the physical integrity of judicial officials intervening in cases such as those involving high profile drug traffickers. The Special Rapporteur acknowledges that in the case of Colombia it is well documented that members of the judiciary have become targets of the violence.

86. International standards provide for the right to a competent, independent, and impartial tribunal to hear cases during states of emergencies. In this respect, Principles 3 (c) and 5 of the Paris Minimum Standards of Human Rights Norms in a state of emergency; 8/ article 27 of the American Convention on Human Rights; and principles 5 (b) (c) (d) (e) (f) of the United Nations draft universal declaration on the independence of justice the Singhvi Principles, 9/ provide that during a state of emergency the right to have an effective remedy before a competent, independent and impartial tribunal is a non-derogable right.

87. Principle 20 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information 10/ provides for general rule of law protections that are applicable in cases of security-related crimes, including the "(g) the right to a fair and public trial by an independent and impartial court or tribunal." The Johannesburg Principles define security-related crime as an act or omission which the Government claims must be punished in order to protect national security or a closely-related interest.

88. The International Covenant on Civil and Political Rights does not explicitly state that the guarantees contained in article 14 do not constitute a non-derogable right; however, as the Special Rapporteur notes, there is an implicit violation of article 14 if the accused is not afforded due process of law which includes the right to a fair hearing by a competent, independent and impartial tribunal.

89. The concealing of the judge's identity, a measure that was supposedly designed to protect the regional judges' and prosecutors' physical integrity, erodes public accountability of judges and prosecutors of the regional jurisdiction. In this respect, principle 6 of the United Nations Basic Principles on the Independence of the Judiciary clearly provides that "the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected". One of the basic rights of the accused in any criminal trial is to know who is sitting in judgment of his case.

90. Principle 2 offers guidelines to reach an impartial judgment; in that respect, it provides that the judiciary shall decide matters on the basis of facts and in accordance with the law, without any improper restriction or

interference, direct or indirect. Whether or not the regional judge had improper motives to convict the accused would be difficult to say when the judge adjudicating was faceless.

91. In view of the internal armed conflict in Colombia, the Special Rapporteur wishes also to point out that in accordance with article 6 of the second additional Protocol to the Geneva Conventions even in a state of disturbance it is a duty of the parties to the conflict to ensure that "no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality".

92. The Special Rapporteur is of the view that the regional justice system falls short of international standards concerning the independence and the impartiality of the judiciary and the right to due process.

93. The use of secret witnesses is another concern. One of the fundamentals of the right to due process for everyone charged with a criminal offence is to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". (Covenant on Civil and Political Rights, art. 14,3 (e)).

94. As mentioned previously, the American Convention on Human Rights provides in article 27.2 that during a state of emergency the judicial guarantees essential for the protection of those rights that are considered to be non-derogable rights constitute per se non-derogable rights. The basic right to dispute and rebut the testimony offered by a witness is severely restricted by the use of secret witnesses within the regional jurisdiction.

95. In addition, Principle 20 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information provides "(h) the right to examine prosecution witnesses;" and "(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she had an opportunity to rebut it" as judicial guarantees that are necessary to observe in cases of security-related crime.

IV. CONDITIONS OF SERVICE THAT HAVE HAMPERED THE INDEPENDENCE AND THE IMPARTIALITY OF THE JUDICIARY AND OF THE PROSECUTORS AND THE RIGHT TO DEFENCE

96. At this juncture, it is important to note what happened in November 1985. The Palace of Justice in Bogotá was attacked by the M-19, a leftist guerrilla movement; several guards were killed and 400 hostages from the Palace were taken, among whom were 11 of the 12 Supreme Court judges of the Penal Chamber. The army and police then launched an assault on the building in an attempt to rescue the hostages; as a result of this counterattack, 91 people were killed, including the President and 9 other members of the Supreme Court; a large part of the Supreme building was burned in the ensuing fire. Some have speculated that one of the rebels' goals may have been to destroy records of extradition requests by the United States in cases involving alleged drug traffickers, who were believed to have helped fund the M-19.

97. The Special Rapporteur would like to emphasize that respect for the conditions of service set forth in the Basic Principles on the Independence of the Judiciary would contribute to the achievement of an independent judiciary. It is the duty of the Government to provide adequate resources to the judiciary for its appropriate functioning including security of tenure as well as adequate remuneration; it is also a duty of the Government to ensure that the judiciary functions without any restrictions, improper influences, inducements, pressures, threats or interferences in order to ensure that it will decide matters before it in an impartial manner as provided by principle 2 of the Basic Principles on the Independence of the Judiciary.

98. The findings of the Special Rapporteur raise concern over violations by the Colombian Government of its international duties in regard to the judiciary.

A. Security measures

99. According to the information received by the Special Rapporteur, during 1996, out of the 26 jurists killed for carrying out their professional duties throughout the entire world, half of them were from Colombia.

100. Studies indicated that attacks against judges in Colombia have increased in the past years. During the mission, several justices informed the Special Rapporteur that their physical integrity was not guaranteed by the State; moreover, a number of judges had received death threats. It is alleged that these threats originate from various sources, including members of the armed forces, paramilitary groups, guerrillas and common criminals. The most obvious threat has come from the drug cartels, in particular the Medellín cartel which allegedly has been responsible for the deaths of many judges and lawyers in the country.

101. The Special Rapporteur was informed also that some judges of the Constitutional Court had been subjected to different forms of pressure by government officials; the President of the Constitutional Court mentioned a telephone call he had received from a Minister amidst a hearing involving the Government.

102. The Special Rapporteur was informed of threats made against a judge following a judgement handed down by a judge of first instance in the municipality of Albania, Department of Caqueta, with regard to military barricades in that area. Upon a petition from the Municipal Personería (a body of the government Procurator's Office, (Ministeria Público) representing the People's Advocate (Defensor del Pueblo) at the municipal level), the judge issued a judicial order to dismantle the barricades, since, as a result of the barricades, the local population could not receive food supplies. In response to the judge's decision, the Commander of the Armed Forces, General Bedoya, was reported to have indicated that if the local military commander followed the judge's order to take away the barricades, he would be subjected to the crime of military disobedience.

103. The President of the Council of State was reported to have stated that the judiciary should stay away from military affairs and tactics, and the Procurator-General of the Nation (Fiscal General de la Nación) reportedly

stated that the judge's order should not have been given, since it went against the order from the public authorities. In addition, the Minister of Defence was reported to have asked for a disciplinary action against the judge. As a result of the threats he received from the armed forces, this particular judge was forced into hiding; he was eventually dismissed from his post by the appellate court.

104. Despite the fact that the Special Rapporteur has not received any specific complaint concerning attempts on the officials of the Procurator-General's Office, the Special Rapporteur is aware of the alarming situation of prosecutors in Colombia that have resulted in the death of several of them during the past years.

105. The Special Rapporteur was informed that judicial officials involved in the investigation of violations committed by members of the armed forces were frequently subjected to death threats. A number of officials of the Procurator-General's Office had been forced to leave the country; among them were the Regional Director of Prosecutors in Calí; the Deputy Prosecutor before the Superior Court who was investigating the murder of senator Alvaro Gomez Hurtado (Fiscal Delegado); and a prosecutor of the Human Rights Unit who was carrying out investigations against a leading member of a paramilitary group. The Vice-Procurator-General indicated that he himself had been on several occasions subject of death threats, from drug-traffickers and paramilitary groups.

106. It is alleged that some members of the armed forces have criticized in the mass media members of the Human Rights Unit of the Procurator-General's Office, this is allegedly motivated by the Unit's investigations of the involvement by State and military agents in human rights violations. At the same time, the military High Command brings pressure to bear on prosecutors in the regional justice system to be more vigilant in prosecuting suspected guerrillas captured by military and security forces.

107. Prosecutors face extreme difficulties in investigating allegations against members of the armed forces, police or security forces. A very strong "esprit de corps" of these institutions prevents investigations from being carried out. Moreover, the military is well-known for lobbying and influencing many other institutions. For instance, it is alleged that judges have been rewarded by the military for having handed down sentences in favour of the military. Moreover, members of Congress who decide upon promotions in the army, have reacted strongly against investigations conducted by the Procurator-General's Office against members of the military.

108. The allegations described above are of serious concern to the Special Rapporteur as they amount to a failure of the Colombian State to provide adequate conditions of service to prosecutors. This contributes to a widespread atmosphere of impunity in which cases of human rights violations are not investigated and consequently those responsible go unpunished.

109. The Special Rapporteur would like to stress the importance of providing prosecutors with adequate conditions of service, in particular, security to conduct fair, independent and impartial investigations that could lead to the prosecution of those responsible for wrongdoings, principally, those

responsible for human rights violations. In this regard, guideline 4 of the Guidelines on the Role of Prosecutors is of particular relevance; it provides that "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability"; guideline 5 provides additionally that "prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions".

Threats to Lawyers and Human Rights Defenders

110. Lawyers and human rights defenders in Colombia are frequently subject to attacks or threats against their lives. Although no exact figures are available as to the number of lawyers who had their human rights violated in the past years, as a result of their activities as lawyers, such violations are reported to occur on a regular basis. Several lawyers, in particular those involved in cases against high-ranking military officials, have been forced to leave the country, due to persistent death threats related to their work. Members of lawyers offices stated that they were under constant vigilance and that their phones were tapped. A lawyers' office in Cúcuta was forced to shut down in 1995 after persistent threats and the killing of one of its members.

111. The Special Rapporteur has often intervened in cases concerning threats against human rights lawyers in Colombia. On 10 August 1995, he submitted an urgent appeal concerning the murder of lawyer Javier Alberto Barriga Vergel on 16 June 1995; according to the source, Mr Vergel was acting on behalf of the Committee for Solidarity with Political Prisoners (Comité de Solidaridad con los Presos Políticos) which is very active in investigating numerous cases of human rights violations that implicate members of the police, the army and paramilitary groups (see E/CN.4/1996/37 para. 135). On 18 March 1996, the Special Rapporteur transmitted an urgent appeal to the Government concerning death threats against Mrs. Margarita Arregoces and human rights lawyer, Mr. Reinaldo Villalba Varga. The message containing the threats was reportedly signed by a paramilitary group called COLSINGUE (Colombia sin guerrillas, Colombia Without Guerrillas), and was also considered to be an indirect threat against Mr. Villalba Vargas who is defending Mrs. Arregoces in a trial which was initiated against her by the regional public prosecutor's office of Santa Fé de Bogotá (see E/CN.4/1997/32, para. 95).

112. On 12 December 1996, the Special Rapporteur sent an urgent appeal concerning Pedro Julio Mahecha Avila, a lawyer and member of the lawyers' collective "José Alvear Restrepo" who was reportedly being followed and watched by unknown individuals. In this context, the Special Rapporteur also referred to an urgent appeal sent previously to the Government by the Special Rapporteur on extrajudicial, summary or arbitrary executions. According to the source, in anonymous phone calls various persons had allegedly tried to find the whereabouts of Mr. Macheca Avila, his wife and his son. It has been reported that those acts of intimidation might be linked to his work as the lawyer of persons who are detained for political reasons, including members of a guerrilla-group. According to the information

received, since the establishment of the lawyers' collective "José Alvear Restrepo", several of its members had been receiving death threats related to their work as human rights lawyers (see E/CN.4/1996/37, para. 96).

113. On 17 July 1997, the Special Rapporteur sent an urgent appeal jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning the lawyer and City Ombudsman of San Calixto, José Estanislao Amaya Páez, who according to the source received a death threat from a paramilitary group called "Autodefensas del Catatumbo" which ordered him to leave the region within eight days. Additionally, it was alleged that this paramilitary group is linked with the Colombian Security Forces (see E/CN.4/1998/39, para. 49).

114. On 1 August 1997, the Special Rapporteur transmitted a communication to the Government concerning lawyers José Luis Marulanda Acosta and Augusto Zapata Rojas who according to the source have been accused by the Colombian military as being active members of the National Liberation Army (Ejercito de Liberación Nacional, ELN). It is alleged that these charges are the result of lawyer Marulanda Acosta's professional defence of John Jairo Ocampo Franco, who was arrested and charged with being an ideologist of the ELN. On 17 November 1997, the Special Rapporteur sent an urgent appeal concerning lawyers Alirio Uribe Muñoz, Rafael Barrios Mendivil and Miguel Puerto Barrera, members of the "José Alvear Restrepo" lawyers' collective. Allegedly, the lawyers had suffered threats and harassment for several months (see E/CN.4/1998/39, paras. 50 and 51).

115. During his mission, the Special Rapporteur interviewed Eduardo Umaña, a defence attorney who claims to have represented some 100 political prisoners, Mr. Umaña is also the attorney for the relatives of victims in 16 cases of disappearances; as a result of his work, he has received threats from the COLSINGUE paramilitary group. He informed the Special Rapporteur that he has rejected security from the State because, in his opinion, members of security are responsible for the threats. Mr. Umaña also explained his difficulties in defending clients before faceless tribunals during the initial stage of the investigation, primarily because the persons arrested were detained in military barracks. Other difficulties encountered were lack of access to his clients and to the case files, not being notified of the proceedings, and the bribery of faceless witnesses to testify against the defendant in return for reduced terms in prison in their own cases. Mr. Umaña also alleged that the judicial officials in the regional courts ignore arguments of defence and fail to read briefs. He informed the Special Rapporteur that the worst aspect of the regional courts is not being able to see the judge.

116. The Special Rapporteur notes that many of the cases submitted to his attention dealt with cases in which human rights lawyers representing persons accused of terrorist-related activities were identified with their clients' cause or were accused of collaborating with subversive elements. The Special Rapporteur is particularly concerned about this practice in Colombia because it constitutes a serious breach of principle 18 of the Basic Principles on the Role of Lawyers that provides that "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions". If there is evidence of such conduct, it is for

the authorities to lodge a complaint with the relevant professional body of lawyers; by merely accusing them of identification, the authorities are resorting to harassment and intimidation.

117. The large number of cases of human rights lawyers having been harassed by members of the armed forces or paramilitary groups raise concerns in regard to the capacity of the Government to provide these lawyers with adequate conditions for discharging their professional functions and consequently to defend their clients, in particular those who are tried before regional courts. Despite the courageous efforts of lawyers who undertake cases that fall within the regional jurisdiction, a practical consequence of the events described above is that lawyers face serious and intimidating reprisals which hampers the rights of the accused. In this regard, the Special Rapporteur would like to point out principle 1 of the Basic Principles on the Role of Lawyers that provides that: "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".

118. Based on his findings, the Special Rapporteur considers that the Colombian Government has failed to provide lawyers with appropriate security conditions as laid down in principles 16 and 17 of the Basic Principles on the Role of Lawyers. Principle 16 provides that "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely, both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." In addition, principle 17 provides that "where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".

B. Conditions of service of the Government Procurator's Office (Ministerio Público)

119. The Special Rapporteur would like to discuss the conditions of service of the bodies making up the Government Procurator's Office (Ministerio Público), i.e. the Office of the Attorney-General of the Nations (Procuraduría General de la Nación), the Office of the People's Advocate (Defensoría del Pueblo) and the municipal representatives (personeros municipales). The Special Rapporteur considers that the importance of these bodies lies in the prosecutorial and/or investigative role that they play in monitoring public institutions. In this regard, the Special Rapporteur would like to emphasize the particular relevance of guideline 4 of the Guidelines on the Role of Prosecutors which provides that "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."

120. The Office of the Attorney-General of the Nation (Procuraduría General de la Nacion) does not have full competence to investigate human rights violations committed by public officials; it is mainly a body of control, which participates in the investigation of such violations. Owing to the lack

of resources, the Office concentrates on the most serious human rights violations, inter alia massacres, multiple murders, torture, enforced disappearance, genocide and violations of humanitarian law. The Human Rights Division (Procuraduría Delegada para los Derechos Humanos) of the Office of the Attorney-General is also involved in preventive action, inter alia in mediation between armed forces and civilians in cases of clashes. In order to avoid duplication, efforts were being made to establish wider collaboration with the Procurator-General's Office (Fiscalía General).

121. The Human Rights Division was facing serious funding problems, which hampered the efficiency of its functions. In addition, civil and military authorities were not cooperative and did not provide access to prisons and military establishments. High-ranking military officials as well as the Ministry of Justice had been informed of this problem. The Division was not aware of any instances of direct interference from the Government or State agents with the investigations carried out by the Attorney-General's Office.

122. The Special Rapporteur met with the People's Advocate (Defensor del Pueblo), who had then been elected by the Chamber of Representatives for a four-year term. It is within the mandate of the People's Advocate to curb any abuse of power from the Government concerning violations of human rights or humanitarian law.

123. The People's Advocate can forward communications received by his Office to the appropriate institutions, such as the Offices of the Procurator-General or of the Attorney-General; he has no competence to actually investigate the allegations. He informed the Special Rapporteur that because of lack of funds his office was unable to follow-up on communications forwarded to other institutions, in order to establish whether any action was undertaken or not. Complaints on corruption by State officials were directly forwarded to the Procurator-General's Office. 11/

124. The Personería Municipal is the body made up of the municipal representatives (personeros municipales) who act in more than 1,000 municipalities of the country as people's advocates, protectors of human rights and civic inspectors. It often depends for financial resources on the approval of the budget by the mayors. In recent years, five personeros have been killed and one has disappeared; no person has been brought to justice for these crimes. In addition, may personeros have been forced to leave their activities after receiving death threats from different groups, including military and guerrilla.

V. IMPUNITY

125. During his mission, the Special Rapporteur was informed by official sources as well as by non-governmental organizations that the failure to properly investigate and prosecute human rights violations, both at civil courts and, in particular, at military courts, is the most serious concern with respect to the administration of justice in Colombia.

126. In October 1996, it was reported that the rate of impunity was over 99.5 per cent; barely 20 per cent of crimes commited were investigated and only in 5 per cent of these cases were charges formally filed by the

Procurator-General (Fiscal General). According to the People's Advocate (Defensor del Pueblo), these numbers have been constant during the past years. The Colombian Commission of Jurists stated that the impunity for cases of human rights violations is virtually 100 per cent.

127. Governmental sources indicated that at the end of 1997, 214,907 arrest warrants were still pending despite the fact that throughout the previous months the police launched an operation called "Pescador" (Fisherman) during which 27,629 judicial orders were implemented concerning cases of homicide and personal injuries.

128. Impunity is allegedly both the cause and the consequence of violence, in particular of human rights violations. Contributing factors are the fear of further violence of victims and witnesses that prevents them from taking legal action, and the lack of effective investigations and penalties that lead government officials and other persons to believe that their actions will go unpunished.

129. The reasons for this alarming situation in Colombia are various. At the level of the ordinary criminal system, it is alleged that the causes of impunity are internal and external. Internal causes are alleged to be a state of neglect for years and the scarcity of financial and human resorces allocated to the judiciary. The Special Rapporteur was informed that since the implementation of the new Constitution in 1991, despite the fact that there has been a significant budgetary effort, the criminal courts are still rudimentary, understaffed and underfunded. External causes are attributed to the direct attacks on representatives of the judiciary. In this regard, the Special Rapporteur refers to his findings presented in chapter IV. It is alleged that in many parts of the national territory, the victims and witnesses prefer to remain silent for fear of reprisals and prefer to move to another region; this situation has made investigations more difficult.

130. Military jurisdiction, however, is one of the primary sources of impunity in Colombia. The effectiveness of military courts in investigating and prosecuting crimes commited by members of the armed forces varies depending on the nature of the offences tried before military courts. It is reported that when the offence concerns internal police or armed forces regulations, the military criminal courts had handed down harsh sentences. However, the situation is quite different when the offences under investigation have been committed against civilians (robbery, injury, murder, etc.); in these cases, a high percentage end in the suspension of the proceedings.

131. The Procurator-General's Office has stated in a recent study that out of 7,903 judgements handed down by military criminal courts from early 1992 to mid-1994, 4,304 were convictions and 4,103 of those were for violations of internal military regulations.

132. The Special Rapporteur wishes to point out the reasons for this alarming situation. It is alleged that the lack of effectiveness of military courts to try and to sentence cases concerning human rights violations committed by members of the armed forces against civilians is due to structural

deficiencies in the military justice system, which guarantee that military and police officials are not criminally sanctioned for such offences.

133. The main structural deficiency is the fact that military courts are composed of active officers. It is alleged that under article 292 of the Military Penal Code it is common for officers to judge subordinate officers who are from the same unit. Closely connected to this, it has been pointed out to the Special Rapporteur that the concept of "due obedience defence" provided by article 91 of the 1991 Constitution relieves the soldier of liability and places the sole responsibility on the superior officer. It is alleged that under this provision, the subordinates can argue that the judges sitting on the bench ordered them to commit the crime. 12/

134. The legal basis for granting jurisdiction to military criminal courts over the crimes commited by military personnel outside the scope of their duties has been a broad judicial interpretation given to article 221 of the 1991 Constitution that provides that "crimes committed by the members of the public force in active service, and in connection with the same service, [shall be tried by] military courts or military tribunals, in accordance with the provisions of the Penal Military Code".

135. It has been brought to the attention of the Special Rapporteur that article 221 of the 1991 Constitution requires that the alleged criminal acts be related to active services. However, the Disciplinary Chamber of the Higher Council of the Judicature whose function is to resolve jurisdictional disputes between the courts, as was mentioned earlier (see para. 59), has given an extremely broad application to the meaning of "service-related" conduct, and very often, assigns cases from the ordinary civilian system to the military tribunals.

136. It is alleged that in resolving the conflicts of jurisdiction between ordinary and military courts, the Higher Council of the Judicature lacks independence and impartiality due to the fact that the Disciplinary Chamber was elected by Congress from a list of candidates emanating from the Executive Branch. In response to allegations that the Chamber favours military courts when deciding upon the jurisdiction of cases, members of the Chamber provided the Special Rapporteur with statistics: between 3 September 1992 and 20 September 1996, the Disciplinary Chamber received 188 requests to resolve jurisdictional conflicts between penal military and ordinary courts; out of these requests, 68 cases were handed over to military courts, and 77 assigned to ordinary civil courts; the members of the Disciplinary Chamber abstained from deciding over 37 cases and they were still considering 6 at the time of the mission.

137. The Special Rapporteur was informed of a case that illustrates the problem described above. The case concerns retired three-star General Karouk Yanine Díaz allegedly involved in financing and supporting the paramilitaries who allegedly participated in the massacre of 19 businessmen in October 1997 in the Magdalena Medio Region. On 25 July 1996, the Procurator-General's Office issued an arrest warrant for General Yanine; however the Higher Council of the Judicature relieved the Human Rights Division of the Attorney-General's Office of its investigation and handed the case over to the military justice system. Even though former General Yanine was implicated in forced

disappearances, torture and extrajudicial executions, the Higher Council of the Judicature determined that the case fell properly within the jurisdiction of the criminal military courts and that they should assume the investigation. Subsequently, General Yanine was acquitted by General Manuel Jose Bonett, the military judge of his case and today Commander of the Colombian Armed Forces. Furthermore, General Bonet severely critized the Attorney-General's Office for persecuting army officials. It is alleged that a number of civilians tried by civil criminal courts were convicted for similar types of offences.

138. In response to allegations that cases brought before military courts generally resulted in the impunity of the offender, the Higher Council of the Judicature also provided the Special Rapporteur with the following information coming from the Secretary of the Higher Military Court: between January and December 1995, military courts handed down 2,138 guilty verdicts and acquitted 651 accused military personnel; in 1,402 cases the proceedings were discontinued. The Special Rapporteur notes that the cases in which the proceedings were discontinued are tantamount to acquittals; consequently, the number of acquittals is almost similar to the number of cases in which military personnel were convicted by military criminal courts. The Special Rapporteur regrets that the source did not indicate the type of offences and personalities dealt with.

139. Nevertheless, information received from the lawyers' collective "José Alvear Restrepo" indicated that when civil prosecutors file charges against agents of the Public Forces, the Higher Council of the Judicature usually grants jurisdiction over these cases to the military courts. The lawyers' collective cited the example of a case wherein a female officer of the police corps for youth was allegedly raped by a superior officer; after the Higher Council granted the military courts jurisdiction over the case, the alleged rapist was absolved of his crime.

140. The Special Rapporteur would like to express his concern in regard to the fact that active-duty officers try their own subodinates for human rights offences commited against civilians. The Special Rapporteur is of the view that given the military structure, active-duty officers lack the necessary independence and impartiality to try cases in which members of the same body are involved. Principle 2 of the Basic Principles on the Independence of the Judiciary provides that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". Active-duty officers, thus, are not seen to be independent and capable to render impartial judgements against members of the same Armed Forces. In this regard, the Special Rapporteur would like to reiterate the 1997 concluding observations of the Human Rights Committee, which stated that "the transfer from civilian jurisdiction to military tribunals of many cases involving human rights violations by military and security forces reinforces the institutionalization of impunity in Colombia since the independence and impartiality of these tribunals are doubtful". The Committee also noted that "the military penal system lacks many of the requirements for a fair trial spelled out in article 14, for example the amendments to article 221 of the

Constitution allowing active-duty officers to sit on military tribunals and the fact that members of the military have the right to invoke as a defence the orders of a superior" (CCPR/C/79/Add.76, para. 18)

141. It was brought to the attention of the Special Rapporteur that in late 1996 a set of constitutional reforms were proposed by several members of the Congress with the support of the Colombian military. According to the information received, these reforms intended to severely restrict the legal basis for investigation on human rights violations undertaken by civil authorities by amending article 250 of the 1991 Constitution and allocating this function to a military unit; to severely restrict judicial review of military human rights abuses by amending article 220 of the Constitution and divesting the disciplinary jurisdiction currently exercised by the Government Procurator's Office (Ministerio Público) over the armed and security forces and restricting its power to impose administrative sanctions; and, finally, to remove important legal protections against arbitrary detentions and physical abuse of detainees by military personnel by amending article 241 (9) of the Constitution and limiting the acción de tutéla (writs for protection of constitutional rights) petitions when it is lodged against members of the security forces and providing for a period of seven-day preventive detention in cases of suspects of an offence against the public order.

142. The Special Rapporteur, however, is pleased to note that the proposed constitutional reforms were not adopted by the plenary of the Congress and did not have the support of the Colombian Government as is reflected in the response of the Government to the questionnaire submitted by the Special Rapporteurs on Extrajudical, Summary and Arbitrary Detentions and on Torture dated on 17 December 1996.

143. The Special Rapporteur has been informed also of the intention of the Government to reform the Military Penal Code, but at the date of writing his report he has not received indication that the reform in fact took place. In September 1996, the Government submitted a bill on reform of the Military Penal Code which, according to the source, reflects most of the recommendations made by international and national legal experts. However, the Special Rapporteur has been informed that the Government's bill has been changed substantially in Congress and that the discussion and approval of the bill have been postponed to the next session (March 1998).

144. There are three main issues which the reform should address. Firstly, it should establish who will judge cases concerning human rights offences committed by members of the armed forces; secondly, it should determine whether crimes covered by military jurisdicition include serious human rights violations; and, thirdly, the reform should establish whether the due obedience clause exempts members of the army who commit human rights violations from criminal responsibility.

145. In regard to the first issue, the Special Rapporteur has been informed that despite the 1995 decision of the Constitutional Court providing that "the provisions in article 221 of the Colombian Constitution permitting active-duty officials to act as judges in cases against officers and soldiers directly under their command violated the principles of independence and impartiality of the judiciary", it was alleged that the armed forces sponsored the

speediest constitutional amendment in Colombian history to amend the Constitution which had the effect of setting aside the decision of the Constitutional Court. Accordingly, this issue has been resolved to favour that active-duty officers can sit as judges in cases in which subordinates are implicated.

146. In regard to the other two critical issues, the Special Rapporteur has been informed that they are still to be resolved by the adoption of the new Military Penal Code. The Special Rapporteur has been informed that the Government proposals are in accordance with international standards that provide that human rights violations should be excluded from the military jurisdiction and that the due obedience clause might be invoked only to superior's orders that are legitimate and do not violate fundamental rights. In addition, the Government has proposed the establishment of an independent judicial mechanism within the Armed Forces before which civilians will be allowed to intervene in proceedings affecting their interest, but only relating to issues of claim for compensation.

147. In this connection, the Special Rapporteur's attention has been draw to the recent decision of the Constitutional Court of 5 August 1997 interpreting article 221 of the 1991 Constitution. In decision C-358/97 the Court laid out three basic rules that should be considered in interpreting the controversial article 221 that provides that "crimes committed by the members of the public forces in active service, and in connection with the same service, [shall be tried by] military courts or military tribunals, in accordance with the provisions of the Penal Military Code".

148. The first rule requires that a clear link in origin between the crime and the activities related to service, which is to say, the punishable act should arise from an excess or abuse of power which occurs within the framework of an activity directly related to the intrinsic functions of the armed body. The second rule is that certain crimes can never constitute an act in relation to military service such as those crimes regarded as crimes against humanity. Finally, the Constitutional Court held that the relationship to military service of the alleged crime must be adequately proven before the court. According to the Court this means that in situations where doubt exists with respect to which courts have jurisdiction over a given proceeding, the decision should fall back in favour of the ordinary [justice system], since it cannot be fully demonstrated that the exception is constituted.

149. According to Colombian legislation, the rules laid out by the Constitutional Court are binding on all other judicial authorities. However, the Special Rapporteur has been informed that the Government has not taken any measure to ensure that those cases currently under military jurisdiction, but which do not meet the standards set out by the Court, are transferred to the corresponding civilian judicial authorities. It is alleged that in one important case, that of the Caloto massacre, a military judge recently held that, notwithstanding the Constitutional Court's decision, the multiple homicide under investigation was carried out by police agents "in relation to service" and should be tried by the military courts. Not surprisingly, the

judge annulled the arrest warrant issued by the Human Rights Unit of the Prosecutor-General's Office and ordered the immediate release from prison of the two police officials implicated in this crime.

150. The current situation of impunity within the judiciary is of a particularly grave concern. In this regard, the Special Rapporteur draws the attention of the Government to international standards that provide for the right to an effective remedy in cases of human rights violations, "notwithstanding that the violation has been committed by persons acting in official capacity" such as the International Covenant on Civil and Political Rights (art. 2, paras. (3) (a), (b) and (c)) the American Convention on Human Rights (art. 25).

151. Furthermore, the Inter-American Court of Human Rights in its first ruling in 1988 on the Velásquez Rodríguez Case 13/ clearly spelled out the obligations that the States Parties assumed under international human rights treaties, in particular under the American Convention on Human Rights in regard to human rights violations in the following terms: "The first obligation assumed by the States Parties under Article 1 is 'to respect the rights and freedoms' recognized by the Convention." (para. 165). "The second obligation of the States Parties is to 'guarantee' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." (para. 166). According to this legal opinion of the Inter-American Court, the Colombian State has the duty to prevent and to investigate human rights violations and to punish those responsible. In addition, it has the international duty to provide adequate compensation to the victims or to the victims' relatives and to attempt to restore the right violated.

152. In this connection, the Special Rapporteur welcomes the enactment in 1996 of Law 288 that creates instruments for the compensation of the victims of human rights violations in compliance with recommendations made by international bodies, such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights. The Special Rapporteur regards Law 288 as a step forward in bringing Colombia to comply with its international duties concerning human rights violations.

153. However, the Special Rapporteur remains particularly concerned about the situation described above of almost total impunity, in particular in military tribunals in Colombia, when trying human rights violations committed by members of the Armed Forces. The Government of Colombia thus has failed to prevent and to investigate violations and to punish those members of the army that commit those violations as required by international law.

VI. FOLLOW-UP TO PREVIOUS MISSIONS

154. During his visit to Colombia, the Special Rapporteur addressed the issue of recommendations made by Mr. Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Mr. Nigel Rodley, Special Rapporteur on the question of torture in their joint report (E/CN.4/1995/111); many of the recommendations made after their visit in October 1994 are related to the question of the administration of justice and/or the independence of judges and lawyers. The Special Rapporteur discussed the implementation of these recommendations with the authorities and non-governmental organizations.

155. In this regard, the Special Rapporteur met with Mr. Carlos Vicente de Roux, Presidential Adviser on Human Rights, who was the Executive Secretary to the ad hoc Commission established in 1995 by Decree 1290 to implement the recommendations. Mr. de Roux stated that the recommendations made were not fully implemented, that a number were still under consideration, and that some recommendations no longer corresponded to the human rights situation of the moment. Having requested an updated report on the actual status of these recommendations, the Special Rapporteur was informed about the developments in their implementation. Accordingly, the Government proposed reforms to the Military Penal Code and the discontinuation of the regional courts was announced for 1999.

VII. CONCLUSIONS

156. The Special Rapporteur is seriously concerned that the rule of law is in jeopardy in Colombia. Notwithstanding this observation, the Special Rapporteur wishes to submit the following conclusions.

A. Office of the High Commissioner for Human Rights in Colombia

157. The Special Rapporteur welcomes the opening of the Office of the High Commissioner in Colombia; this will allow for continued monitoring of the human rights situation of the country and oversight of the implementation of recommendations made by special procedure mechanisms and treaty bodies.

B. Regional Courts

158. The Special Rapporteur takes note of the recent decision of the Government to discontinue the use of regional courts by 30 June 1999. However, he wishes to reiterate the recommendations of the Human Rights Committee urging that the regional justice system be abolished; he feels that this should be done without delay.

159. The Special Rapporteur acknowledges the serious situation of violence that the Colombian State is facing which has now reached the threshold provided by international humanitarian law. In this regard, he acknowledges the right of the Government to adopt exceptional measures to curb this phenomenon of violence in Colombia and its right to derogate from certain rights; this right, however, is subject to conditions that need to be observed as provided by international law.

160. The Special Rapporteur feels that the procedures of the regional courts fall short of international standards concerning the independence and the impartiality of the judiciary and the right to due process. The use of secret witnesses is a particularly serious concern. The basic right to rebut the testimony of police witness is severely restricted in this procedure. Principle 20 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information provides "(h) the right to examine prosecution witnesses;" and "(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she had an opportunity to rebut it" as judicial guarantees that are necessary to observe in cases of security-related crime.

C. Conditions of service

161. Judges lack the necessary conditions of work which will enable them to perform their judicial functions without restrictions, improper influences, inducements, pressures, threats or interferences; judges have also become the target of political violence.

162. It appears that the government apparatus lacks the means, or even worse, the political will, to conduct thorough investigations and to prosecute those responsible for the attacks on the judiciary.

163. The lack of necessary conditions of service, mainly the security of judges, creates a situation in which judges are intimidated and consequently not in a position to render judgements in an impartial manner based on the evaluation of the facts and the applicable laws. An intimidated judiciary is not a guarantor for respect of the human rights of the population.

164. The Office of the Procurator-General of the Nation (Fiscalía General de la Nación) does not have the proper environment to perform its investigatory tasks, in particular in cases involving human rights violations committed by members of armed forces. This situation contributes to a widespread atmosphere of impunity in which cases of human rights violations are not investigated and consequently those responsible go unpunished.

165. The Special Rapporteur stresses the importance of providing prosecutors with adequate conditions of service, in particular security, to conduct fair, independent and impartial investigations that could lead to the prosecution of those responsible for wrongdoings, principally those responsible for human rights violations.

166. Lawyers and human rights defenders in Colombia are frequently subject to attacks or threats against their lives. Although no exact figures are available as to the exact number of lawyers who had their human rights violated in the past years, as a result of their activities as lawyers, such violations are reported to occur on a regular basis.

167. The Special Rapporteur has intervened in several cases concerning threats and attacks on human rights lawyers in Colombia. Several lawyers, in particular those involved in cases against high-ranking military officials,

have been forced to leave the country, due to persistent death threats related to their work. Members of lawyers collectives stated that they were under constant vigilance, and that they had their phones tapped.

168. This situation is of particular concern when it relates to the defence of those charged with crimes that fall within the regional jurisdiction; lawyers face the problems of serious and intimidating procedures and rules of evidence that prevent them from representing persons accused of a crime that falls within the regional jurisdiction.

169. Members of the Government Procurator's Office (Ministerio Público) face a similar environment which hampers the discharge of their prosecutorial functions within public administration institutions.

D. Impunity

170. Given the high rate of impunity at military tribunals (99.5 per cent), the Special Rapporteur is of the view that the Government of Colombia has failed to prevent and to investigate human rights violations and to punish those members of the army that commit these violations as required by international law.

171. A contributing factor to this situation is that the Disciplinary Chamber of the Higher Council of the Judicatura had been resolving jurisdictional conflicts between penal military and ordinary courts by handing over cases concerning human rights violations committed by members of the army to the military courts. The Disciplinary Chamber is widely seen as lacking the necessary independence from the executive arm of the Government to carry out its task properly.

172. The Special Rapporteur feels that given the highly hierarchical structure of the military, an institution which is based on principles of loyalty and subordination, active-duty officers lack the necessary independence and impartiality to try cases in which members of the same body are involved in cases related to violations of human rights committed against civilians. Active-duty officers, thus, are not seen to be independent and capable of rendering impartial judgements against members of the same Armed Forces.

173. The Special Rapporteur is aware that the proposed changes to the Military Penal Code are said to be in accordance with international standards. However, he has been informed that the discussion in Congress of these proposals has been postponed to the next session (March 1998). The Special Rapporteur urges the Government to proceed speedily with the changes in accordance with international standards.

174. The Special Rapporteur welcomes the recent judgement of the Constitutional Court laying out three basic principles with regard to military courts' jurisdiction over cases involving active-duty officers committing human rights violations against civilians. The Special Rapporteur urges the Government to adopt the necessary measures to implement this judgement. In particular, the Higher Council of the Judicature and the Military Courts must

respect the decisions of the Constitutional Court and ensure that human rights violations involving active-duty officers are tried by civilian courts.

175. The Special Rapporteur welcomes the enactment in 1996 of Law 288 that creates instruments for the compensation of the victims of human rights violations in compliance with recommendations made by international bodies, such as the Human Rights Committee and the Inter-American Commission on Human Rights.

176. The Special Rapporteur considers that the Government to date has not meaningfully implemented most of the recommendations contained in the joint report of the Special Rapporteurs on extrajudicial, summary and arbitrary executions, and on torture (E/CN.4/1995/111) relating to the administration of justice. The Special Rapporteur notes that the Human Rights Committee also expressed concern "that the suggestions and recommendations it addressed to the Government at the end of the consideration of the previous report (see CCPR/C/64/Add.3 and A/47/40, paras. 390-394) have not been implemented" (CCPR/C/79/Add.76, para. 14).

VIII. RECOMMENDATIONS

177. On the question of recommendations, the Special Rapporteur has in the body of this report and in the above conclusions stressed the several issues the Government of Colombia needs to address to improve the administration of justice, including the independence of the justice system, for effective protection of human rights. Most of these issues and recommendations are not new; they have been dealt with previously by other Rapporteurs and other concerned organizations. In this regard, the Special Rapporteur has had the advantage of reading the latest 11-page press release of the Inter-American Commission on Human Rights dated 8 December 1997 related to its visit to Colombia.

178. The Special Rapporteur considers that unless there is a political will on the part of the Government to adopt bold reform measures as spelt out in this report and others, administration of justice in Colombia will not improve but instead will deteriorate.

179. As a matter of priority, the Special Rapporteur recommends the immediate implementation of the relevant recommendations of the Human Rights Committee contained in their concluding observations of 9 April 1997 following the consideration of the fourth periodic report of Colombia (CCPR/C/79/Add.76), as well as those of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions contained in their joint report on their visit to Colombia (E/CN.4/1995/111). In the following paragraphs the Special Rapporteur reiterates the outstanding recommendations of the Committee and the two Special Rapporteurs.

A. Human Rights Committee

Paragraph 32 of CCPR/C/79/Add.76

180. "The Committee recommends that in order to combat impunity, stringent measures be adopted to ensure that all allegations of human rights violations

are promptly and impartially investigated, that the perpetrators are prosecuted, that appropriate punishment is imposed on those convicted and that the victims are adequately compensated. The permanent removal of officials convicted of serious offences and the suspension of those against whom allegations of such offences are being investigated should be ensured."

Paragraph 33 of CCPR/C/79/Add.76

181. "The Committee recommends that special measures be adopted, including protective measures, to ensure that members of various social sectors, particularly journalists, human rights activists, trade union and political leaders, teachers, members of indigenous populations and judges, are able to exercise their rights and freedoms, including freedom of expression, assembly and association, without intimidation of any sort. [...]."

Paragraph 34 of CCPR/C/79/Add.76

182. "The Committee also urges that all necessary steps be taken to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation. To this end, the Committee recommends that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General [Procuraduría General] and the Public Prosecutor [Fiscal General]*. More generally, the Committee recommends that the new draft Military Penal Code, if it is to be adopted, comply in all respects with the requirements of the Covenant. The public forces should not be entitled to rely on the defence of 'orders of a superior' in cases of violations of human rights."

Paragraph 40 of CCPR/C/79/Add.76

183. "The Committee urges that the regional judicial system be abolished and that the Government of Colombia ensure that all trials are conducted with full respect for the safeguards for a fair trial provided for in article 14 of the Covenant."

Paragraph 41 of CCPR/C/79/Add.76

184. "The Committee recommends that the Government put an end to the de facto exercise by the military of powers in the Special Public Order Zones established by decrees which are no longer in force."

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* Editor's note: in the present report the titles Fiscal General and Fiscalía General are rendered in English as "Procurator-General" and "Office of the Procurator-General".

B. Special Rapporteur on the question of torture and Special Rapporteur on extrajudicial, summary or arbitrary executions

Paragraph 117 of E/CN.4/1995/111

185. "[...] The Special Rapporteurs [...] call on the authorities to take the necessary steps with a view to strengthening the ordinary justice system so as to make it more efficient in all circumstances, thus making unnecessary the use of the special justice systems, such as the Regional Justice System. The following may be recommended to this effect:

(a) Allocation of the necessary human and material resources, especially at the investigative stages of judicial proceedings. Judicial police functions should be carried out exclusively by a civilian entity, namely the technical unit of the criminal investigation police. This would allow the independence of investigations and constitute an important improvement in the access to justice for victims of and witnesses to human rights violations, who, at present, very often see their complaints being investigated by the very institutions they accuse of being responsible for these violations.

(b) The provincial and departmental offices of the Procuradoría [Office of the Attorney-General] should be given sufficient autonomy and resources to carry out prompt and effective investigations into alleged human rights violations.

(c) As long as the Regional Justice System exists, the crimes falling under this jurisdiction should be clearly defined so as to avoid acts which constitute a legitimate exercise of political dissent and social protest being considered as "terrorism" or "rebellion". Furthermore, defendants before regional courts must enjoy full respect for their right to a fair trial. The severe restrictions currently in place, including those affecting the right to habeas corpus, a procedure essential for protecting people deprived of their liberty from torture, disappearance or summary execution, should be eliminated.

(d) Effective protection should be provided for all members of the judiciary and the Public Ministry [Ministerio Público]* from threats and attempts on their lives and physical integrity, and investigations into such threats and attempts should be carried out with a view to determining their origin and opening criminal and/or disciplinary proceedings, as appropriate.

(e) Likewise, provision should be made for effective protection of persons providing testimony in proceedings involving human rights violations."

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* Editors note: in the present report the title Ministerio Público is rendered in English as "Government Procurator's Office".

Paragraph 120 of E/CN.4/1995/111

186. "As for the military justice system, measures must be taken in order to ensure its conformity with the standards of independence, impartiality and competence required by the pertinent international instruments. Due regard should be given, in particular, to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, and endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Thus, an important step forward would be a substantial reform of the code of military justice, along the lines suggested, inter alia, by the Procuraduría General [Office of the Attorney-General]. These reforms would need to include the following elements:

(a) Clear distinction between those carrying out operational activities and personnel involved in the military judiciary, who should not be part of the normal chain of command;

(b) Recomposition of the military tribunals by a corps of legally trained judges;

(c) Ensuring that those responsible for the investigation and prosecution of cases are also entirely independent of the normal military hierarchy and professionally qualified, if not indeed a specialized branch of the Fiscalía [Office of the Procurator-General]. They should be given sufficient human and material resources to fulfil their functions;

(d) Removal of the defence of obedience to superior orders in respect of crimes under international law such as extrajudicial, summary or arbitrary executions, torture and enforced disappearances;

(e) Giving full effect to the recent Constitutional Court decision requiring involvement of the parte civil [claimant for criminal indemnification]; and

(f) Explicitly excluding from military jurisdiction the crimes of extrajudicial, summary or arbitrary execution, torture and enforced disappearance.

Furthermore, the organ deciding in conflicts of competence between the civilian and the military justice systems should be composed of independent, impartial and competent judges."

187. The Special Rapporteur wishes to emphasize that the State must take stronger and more effective measures to protect the legitimate activities of lawyers and public officials who have dedicated themselves to defending human rights. Further, adequate resources must be allocated to the human rights units of the Office of the Procurator-General of the Nation [Fiscalía General de la Nación] and of the Office of the Attorney-General of the Nation [Procuraduría General de la Nación], the Office of the People's Advocate (Defensoría del Pueblo), municipal representatives (personeros municipales)

and other State actors who investigate violations of human rights, thereby enabling the State to address the serious problem of impunity in Colombia.

Notes

1/ By its decision 1980/124, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Mr. L.M. Singhvi with the preparation of a report on the independence and impartiality of judiciary jurors and assessors and the independence of lawyers. The text of the draft universal declaration on the independence of justice was submitted in the Special Rapporteur's final report to the Sub-Commission at its thirty-eighth session in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6) the declaration itself being contained in document E/CN.4/Sub.2/1985/18/Add.5/Rev.1.

2/ Adopted at the IBA's Nineteenth Biennial Conference held in New Delhi, October 1982.

3/ After six years of study by a special subcommittee chaired by Mr. Subrata Roy Chowdhury of India and two additional years of revision by the full Committee on the Enforcement of Human Rights Law, the 61st Conference of the International Law Association, held in Paris from 26 August to 1 September 1984, approved by consensus a set of minimum standards governing states of emergency. The American Journal of International Law, vol. 79, 1985, pp. 1072-1081.

4/ These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersand, South Africa.

5/ Article 214,6 of the Constitution provides the following: "The Government will send to the Constitutional Court on the day following their promulgation the legislative decrees issued under the powers mentioned in the above articles so that the Court may decide definitively on their constitutionality. Should the Government not comply with the duty transmitting the decrees, the Constitutional Court will automatically and immediately take cognizance of same."

6/ Article 241 (9) of the 1991 Constitution provides that the Constitutional Court "[r]evise, in the form determined by law, the judicial decisions connected with the protection of constitutional rights". Article 86 of the Constitution provides that "[e]very individual may claim legal protection to claim before the judges, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or ommission of any public authority. The protection will consist of an order so that whoever solicits such protection may receive it by a judge enjoining others to act or refrain from acting. The order, which will

have to be implemented immediately, may be challenged before the competent judge, and in any case the latter may send it to the Constitutional Court for possible revision."

7/ Members of the Disciplinary Chamber denied allegations that the Chamber would favour military tribunals; they provided the Special Rapporteur with the following statistics. Between 3 September 1992 and 20 September 1996 out of a total of 188 communications on conflict of jurisdiction between the penal military jurisdiction and regular jurisdiction, 68 cases had been allocated to penal military justice, 77 had been allocated to ordinary justice, 37 were not decided, and 6 were under consideration. As an illustration, in response to allegations that cases brought before military courts generally result in impunity, the Higher Council of the Judicature provided statistics from the Secretary of the Superior Military court on the status of cases of the period January and December 1995: 2,138 condemnatory sentences (sentencias condenatorias); 651 acquittals (sentencias absolutorias); and, 1,402 cases in which the charges were dropped. The Special Rapporteur would like to point out that the number of cases that have been closed because of the dropping of the charges is very high.

8/ See footnote 3.

9/ See footnote 1.

10/ See footnote 4.

11/ The People's Advocate was involved in the training of lawyers and prosecutors, to deal better with the accusatory system as established in Colombia under the 1992 Constitution. The Assistant People's Advocate is responsible for the provision of legal aid for persons who cannot afford legal services. To this effect, the Office of the People's Advocate collaborates with the universities and the Bar Association (Colegio de Abogados), and contracts lawyers who carry out the legal counsel work for him; at the time of the mission, 480 of such lawyers were contracted; the Office estimated that approximately 2,000 lawyers were needed to meet the demand for legal aid.

12/ Article 91 of the Constitution provides that: "[i]n the case of a manifest infraction of a constitutional precept to the disadvantage of any individual, order from a superior does not absolve the executing agent from responsibility. The military in the service are exempted from this provision. As far as they are concerned, responsibility will fall exclusively on the superior officer who gives the order."

13/ OAS, Inter-American Court of Human Rights, Series C: Decisions and Judgements No. 4, Velásquez Rodríguez Case, Judgement of 29 July 1988, paras. 165 and 166.